## NEW STRAITS TIMES (MALAYSIA) BHD. v. KUMPULAN KERTAS NIAGA SDN. BHD. & ANOR.

**[F.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) October 15 & November 30, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 49 of 1984]**

*Practice and Procedure – Pleadings – Claim for damages for libel – Application to strike out statement of defence on basis that it disclosed no defence – No evidence admissible – Court to consider only pleadings – R.H.C. 1980, O.18 r. 19.*

In this case the respondents had brought an action against the appellants for libel. The respondents applied to strike out the defence. The learned trial judge at first dismissed the respondents' application and allowed the appellants' application to amend their Defence but subsequently she reversed her earlier decision and ordered the entire Statement of Defence of the appellants to be struck out. The appellants appealed.

**Held**, allowing the appeal: (1) in an application to strike out pleadings under Order 18 rule 19(1)(a) no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the Statement of Defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable;

(2) in this case the learned Judge erred in law in ordering the appellants' defence to be struck out. The appellants have raised triable issues of fact and these issues can only fairly be resolved by evidence *viva voce* at the trial and not merely by affidavit evidence.

*Cases referred to:*

(1) *Golden Century Development Sdn. Bhd.* v. *Ganhoe* [1983] 1 M.L.J. 86.
(2) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238.
(3) *Lawrance* v. *Lord Norreys* (1890) 15 App. Cas. 210, 219.
(4) *Drummond-Jackson* v. *British Medical Association* [1970] 1 W.L.R. 688.
(5) *Moore* v. *Lawson* (1915) 31 T.L.R. 418.
(6) *A.G. of the Duchy of Lancaster* v. *L. & N.W. Rlwy. Co.* [1892] 3 Ch. 274.

FEDERAL COURT.

*C. Abraham* for the appellants.
*P.G. Segran* for the respondents.

*Cur. Adv. Vult.*

**Mohamed Azmi F.J.** (delivering the Judgment of the Court): This is an appeal against the order of the High Court at Kuala Lumpur made on February 16, 1984 wherein the entire amended Statement of Defence of the appellants/defendants was struck out under order 18 rule 19, Rules of the High Court and Interlocutory Judgment entered against them for damages to be assessed in respect of two libellous articles published by the *Malay Mail*, a national newspaper of which the appellants are the proprietors, publishers and printers.

The respondents'/plaintiffs' Summons-in-Chambers dated December 24, 1982 was heard in Chambers together with the appellants' application to amend the Statement of Defence. The respondents' application to strike out the Defence was supported by two affidavits of Sheikh Abdullah (4th respondent) sworn on December 22, 1982 and March 4, 1983, and was opposed by the affidavit in reply of Asiah Mohd. Yusoff, the appellants' legal officer, sworn on March 1, 1983. At the joint hearing of both applications in Chambers on May 6, 1983, the learned Judge dismissed the respondents' application and allowed the appellants' application to amend their Defence. But on further arguments in open court when a third affidavit of Sheikh Abdullah sworn on January 6, 1984 and a second affidavit of Asiah sworn on January 11, 1984 were considered, the learned Judge reversed her earlier decision in Chambers by ordering the entire Statement of Defence of the appellants to be struck out.

The respondents' application was made under Order 18 Rule 19, Rules of the High Court on the basis that the Statement of Defence disclosed no defence; it is scandalous, frivolous and vexatious; and it is an abuse of the process of the court.

During the hearing in Chambers, Mr. Abraham, counsel for the appellants, raised a preliminary objection that the respondents' counsel did not make any submission that the Statement of Defence was scandalous, frivolous and vexatious, and that although three grounds were raised in the Summons, the respondents' application was argued solely on the basis that the Statement of Defence disclosed no Defence. In the circumstances, the court should not look at the affidavits in deciding whether the appellants' pleading disclosed no Defence. It is not clear from the appeal records whether the objection of Mr. Abraham was upheld when the learned Judge dismissed the respondents' application in the first instance. It is equally not clear whether the objection was overruled when the Order-in-Cham-

bers was reversed after arguments in open court. Be that as it may, we are satisfied on perusing the appeal records that both in Chambers and open court the respondents' application to strike out the Defence proceeded entirely on the basis that the Statement of Defence did not disclose any Defence under order 18 rule 19(1)(a) R.H.C. although the respondents' Summons and paragraph 12 of Sheikh Abdullah's second affidavit did mention the defence of beneficial ownership as scandalous, frivolous and vexatious. Order 18 rule 19 provides:–

"19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

In *Golden Century Development Sdn. Bhd.* v. *Ganhoe,*[1] the appellants had applied in a reverse situation from the present case, to set aside the writ of summons and Statement of Claim on the ground that they disclosed no reasonable cause of action under order 18 rule 19. Wan Suleiman, F.J. in delivering the judgment of this court had this to say at page 86:–

"Appellants had filed two affidavits as well as various documents in support of their application. Counsel for the respondents/plaintiffs very properly objected to the admissibility of such evidence for the purposes of this application in view of the express prohibition contained in 0.18 r. 19(2), and the learned Judge accordingly proceeded to consider the application without regard for such evidence. Since Mr. Nathan for the appellants conceded that the affidavits and documents are indeed inadmissible, we need not dwell any further on this aspect of the application."

Again in *Wenlock* v. *Moloney,*[2] after the pleadings were closed, the defendant applied to the Master under R.S.C. order 18 rule 19, alternatively under the inherent jurisdiction of the court, to strike out the pleadings and dismiss the action on the grounds that the pleadings disclosed no reasonable cause of action, were frivolous, vexatious and an abuse of the process of the court. Ten affidavits were filed, five by the defendants in support of the application and five by the plaintiff in opposition thereto. The Master read the affidavits, the documents exhibited thereto and considered the issues of fact raised by the affidavits. There was no cross-examination on the affidavits or oral evidence. The Master held that the plaintiff's action was most unlikely to succeed and he accordingly struck out the pleadings and the action. On appeal to the Court of Appeal, it was held that the trial of issues of fact on affidavits to ascertain whether the plaintiff had a case was an usurpation of the functions of the trial judge and was a wholly improper procedure; and that since the pleadings on their face disclosed a reasonable cause of action and raised issues of fact which required to be determined on oral evidence, the action would not be struck out but would proceed to trial. Similarly in *Lawrance* v. *Lord Norreys,*[3] Lord Herschell had this to say:–

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."

In a claim for damages for libel, it was held that the power under order 18 rule 19(1)(a) should only be used in plain and obvious cases (see *Drummond-Jackson* v. *British Medical Association*).[4] The court will not strike out a pleading on the ground that the words are incapable of defamatory meaning but will leave the question whether they are capable of such a meaning to be dealt with at the trial (see *Moore* v. *Lawson*).[5]

It is therefore clear law that in an application to strike out pleadings under order 18 rule 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the Statement of Defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsus-

tainable (see *A.G. of the Duchy of Lancaster* v. *L and N.W. Ry Co.*[6]).

Coming back to the present appeal, in their Statement of Claim the respondents alleged that the two offending articles entitled "PROBE ON MILLION $ SCANDAL" and "UNREGISTERED FIRM GOT $900,000/- PRINTING JOBS" which appeared in August 19 and 21, 1982 issues of the *Malay Mail* were printed falsely and maliciously by the appellants. The articles reported corruption and irregularities in the award of ten printing contracts worth about $900,000/- in 1980 by the Government Printers to SYARIKAT WATAK *BARU* – the former name of first respondent company before it was changed to its present name Kumpulan Kertas Niaga Sdn. Bhd. in June 1982 (see Exhibit "MM12"). The ten printing contracts were in fact awarded to a partnership of Azizah and Yong Liew Wah which was trading under a similar name – SYARIKAT WATAK *BAHRU*. It should be noted that the only difference in the two names is in the spelling of BARU and BAHRU. In effect Syarikat Watak Baru (the former name of first respondent company) was incorporated as a limited company in 1981 (see Exhibit MM11 at page 123 of appeal record) and as such it could not have been awarded with printing contracts in 1980. Thus, the gist of the respondents' case was that they had been wrongly identified as SYARIKAT WATAK *BAHRU* – a firm registered on January 7, 1980 under the Business Registration Ordinance 1956 (see Exhibit MM3 at page 28 of appeal record) and to whom the alleged corruption and irregularities ought to have been referred by the *Malay Mail*. By their Statement of Defence as amended, the appellants raised three defences – (1) justification, (2) fair comment, and (3) that the first respondent company (formerly known as SYARIKAT WATAK *BARU)* were the beneficial owners of SYARIKAT WATAK *BAHRU* firm. By affidavit evidence the respondents through Sheikh Abdullah totally denied having any connection whatsoever with the partnership of Azizah and Yong. The learned Judge agreed and came to the following conclusion after dealing with the affidavit evidence and the documents annexed thereto:–

"As I have already stated above, it has already been established conclusively that the first plaintiff is not and has never been the beneficial owner of Syarikat Watak Bahru. As for their defence of justification and fair comment, I could not agree with them more on this that such defences are sustainable if they had succeeded in establishing that the first plaintiff is the beneficial owner of Syarikat Watak Bahru. Since they had failed to do so, I consider that the defences raised are attempts to cloud the real issues in this case and to unnecessarily delay and prolong the proceedings of this suit."

On the principle governing the application to strike out pleadings under order 18 rule 19(1) (a) R.H.C., we are of the opinion that the learned Judge erred in law in ordering the appellants' defence to be struck out. In our view the appellants have raised triable issues of fact and these issues can only be fairly resolved by evidence *viva voce* at a trial and not merely by affidavit evidence. In this particular case it is quite impossible to hold conclusively on mere affidavit evidence and documents annexed thereto that the appellants could not possibly prove that the first respondent company is traceable beneficially or legally to the firm of SYARIKAT WATAK *BAHRU* in which Azizah Haji Osman and Yong Liew Wah are partners. The distinct legal entity between SYARIKAT WATAK *BARU* (the former name of first respondent company) and the partnership of SYARIKAT WATAK *BAHRU* disclosed by documents attached to affidavits cannot by itself deprive the appellants from any defence of beneficial ownership. It is too premature to say whether the appellants would be allowed to lift the corporate veil of first respondent company and even if they were allowed to do so, it is mere conjecture at this stage whether they would find any connection between the partnership and first respondent company. After all both Azizah and Yong have not given any evidence, and the similarity in the name of the limited company and the partnership can be a double-edged weapon depending on the evidence to be adduced particularly when the name SYARIKAT WATAK BARU was changed only a few months before the publication of the offending articles. Further, as acknowledged by the learned Judge justification and fair comment are not sham defences if the defence of beneficial ownership can be proved. Datuk Ibrahim, the former Director-General of Government Printers has been charged for corruption and he too may have something to say on the issue of beneficial ownership apart from Azizah and Yong. The five respondents should also be open to cross-examination on that issue of fact.

In the circumstances we find that the order striking out the whole Statement of Defence should be set aside. The original Order-in-Chambers dismissing the respondents' application should be

restored and the case should proceed to trial. We would therefore allow this appeal with costs both here and in the court below. The deposit should be refunded to the appellants.

*Appeal allowed.*

Solicitors: *Shearn Delamore & Co.; Manuel & Segran.*

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## PUBLIC PROSECUTOR v. LENG CHOW TENG

**[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F. JJ.) September 17 & December 12, 1984]**
**[Kuala Lumpur – Federal Court Criminal Reference No. 3 of 1979]**

*Criminal Law and Procedure – Plea of guilty – Plea of guilty in absence of counsel lawful – Plea not to be accepted unless Court is satisfied that absence of counsel properly accounted for – Criminal Procedure Code (F.M.S. Cap. 6), s. 173(a), (b) & (m).*

In this case the respondent had been charged in the Magistrate's Court on two charges for possession of opium and possession of utensils for smoking opium. The respondent appeared with counsel on August 17, 1978 and claimed trial to both charges. A date of hearing was fixed for February 15, 1979 and bail was granted. The case was however postponed to August 9, 1979 and the accused was remanded in custody. The case against the respondent was brought forward to July 4, 1979 without the counsel being notified. The respondent pleaded guilty and was sentenced to 8 months' imprisonment on the first charge and 3 months on the second charge, both sentences to run with retrospective effect from February 15, 1979. The record was called for by Harun J. and after hearing counsel for the respondent and the Deputy Public Prosecutor he quashed the conviction and set aside the sentences. The Public Prosecutor thereupon referred the following question to the Federal Court –

"Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea".

**Held**: the plea of guilty in such a case is good in law but such a plea should only be recorded but not accepted unless the court is satisfied that the absence of the defence counsel has been properly accounted for. The acceptance of such a plea in the absence of counsel is bad in law as without counsel's advice the accused could not be said to have understood the nature and consequences of the plea or to have intended to admit without qualification the offences alleged against him.

*Cases referred to:*

(1) *R.* v. *Tan Thian Chai* [1932] M.L.J. 74.
(2) *R.* v. *Heyes* 34 Cr. App. R. 161.

FEDERAL COURT.

*Miss Tee Hong Geok* (Deputy Public Prosecutor) for the applicant.

Respondent absent (not served).

*Cur. Adv. Vult.*

**Mohamed Azmi F.J.** (delivering the Judgment of the Court): At the instance of the Public Prosecutor, the following question of law of public interest has been referred to us under section 66, Courts of Judicature Act, 1964:–

Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea.

The respondent was charged in the Magistrate's Court, Kuala Lumpur on two counts under the Dangerous Drugs Ordinance 1952 for possession of opium and utensils for smoking opium, both offences were alleged to have been committed on July 17, 1978. The respondent appeared in court with counsel on August 17 and claimed trial to both the charges. A date of hearing was fixed for February 15, 1979 and as usual bail was granted. The case was however postponed to August 9, 1979 and when counsel appeared on that date, he was informed that the case against his client had been brought forward and his client (the respondent) had apparently pleaded guilty in person on July 4, 1979 without the counsel being notified, and was sentenced to 8 months' imprisonment on the first charge and 3 months on the second charge, both sentences to run with restrospective effect from February 15, 1979 – the date when the accused was apparently put on remand, notwithstanding the bail granted by the court and executed by the respondent.

The record of the criminal proceeding was called up by Harun J. for the purpose of satisfying himself as to the correctness, legality and propriety of the conviction with a view to exercising his power of revision under Chapter XXXI Criminal Procedure Code, after he had received a letter of complaint from Mr. Kanesalingam, counsel for the respondent. After hearing the submission of Mr. Kanesalingam and the Deputy Public Prosecutor,